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ABSTRACT

This document reviews the rights of non-tenured faculty using the cases of "Perry v. Sindermann" and "Board of Regents v. Roth" as examples. Following background material and dimensions of the problems, it is suggested that a redefinition of principles that should operate and an identification of procedural safeguards that should be available is the American Association of University Professors' statement on procedural standards regarding the renewal or nonrenewal of faculty appointments. The appendix reports the A.A.U.P. statement on standards. (MJM)

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THE RIGHTS OF NONTENURED FACULTY: THE NEW CONSTITUTIONAL DOCTRINE OF PERRY v. SINDERMANN AND BOARD OF REGENTS v. ROTH

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1. Background and Dimensions of a Problem

"All teachers are equal in their academic freedom, but some teachers are more equal than others (viz., those with tenure)!"[1] Professor Van Alstyne, while not in sympathy with those within the academic community, who find fault with an anomaly in the present tenure system, used this variation on the motto in Animal Farm as a way of stating the critics' position. Thus stated, the motto brings into focus an apparent problem of adequately protecting the procedural rights of all teachers, tenured and nontenured alike. The critics of the present tenure system contend that the protection of academic freedom requires that there be no distinctions between teachers. Their argument, as reported, also unsympathetically, by the Special Committee on Nontenured Faculty, may be stated as an either/or proposition: "(1) all faculty members should enjoy the protections associated with tenure (i.e., being subject to dismissal only for adequate cause as determined by a full hearing on charges before one's peers), or (2) no faculty member should enjoy these protections, and all appointments should be reviewed...at regular intervals without obligation to demonstrate cause" should an appointment be terminated.[2] Equality of status would definitely be a consequence in

the event that either of these conditions were made operational. But whether academic freedom could be assured to any faculty member under the second condition is doubtful, unless their common status compelled all teachers to stand together in unwavering union on the ground that a violation of this right in the case of the one places academic freedom in jeopardy for all.

Regardless of the surface impressions that might justify implementing the either/or proposition, there seems to be little likelihood that widespread support can be found within the academic community to achieve the critics' goal of equality of status. In the absence of a faculty referendum on this issue, the claim that academicians are largely opposed to the either/or proposition is necessarily a supposition. Nevertheless, such evidence as will be brought to light herein suggests the validity of the foregoing claim. We may, therefore, reasonably presume that the justifications for retaining distinctions in several respects between tenured and non-tenured teachers are more widely supported than the arguments in favor of the either/or proposition.

The need for distinctive statuses and admittedly different degrees of academic due process for tenured and nontenured teachers is justified by both Van Alstyne and the Special Committee. We may acknowledge, Van Alstyne argues, that a difference in the degree of protection attaches to each status, but the situation may not be simplistically defined as

one of "'full' academic due process vis-a-vis 'no' academic due process."[3] Both recent developments in federal courts, he contends, and the AAUP's "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments" prescribe procedural safeguards in cases of nontenured teachers' contracts not being renewed.

Protective safeguards, such as notice and hearing, have long been available in cases where a nontenured teacher had been dismissed before the expiration of the term of his contract. The rights provided in such cases, however, were most likely derived from legally defined, contractual obligations of statutory and common law and not as protections that were peculiarly the rights of nontenured teachers. It has also been argued by some, such as Van Alstyne and the courts, that nontenured teachers had the right to initiate proceedings for a hearing on allegations that the reasons for their not being reappointed were violative of academic freedom, or that the decision had been reached without adequate consideration of the merits of granting them new contracts. This claimed right to initiate a request for a hearing and to have that request honored is of doubtful validity, a matter to which we may momentarily direct our attention. Professor Van Alstyne brings into the debate still other reasons for justifying both the distinction in status and the differences in degree of academic due process. For example, the dismissal of a tenured teacher should only proceed on grounds of "adequate cause" and in accordance with a full-scale hearing,

for the degree of hardship worked upon him on being dismissed after lengthy service is greater than what would be experienced by the younger, nontenured teacher whose service to the institution had been for a briefer period. Nor should tenure be automatically acquired by the novice faculty member at the time he is first offered a contract. The probationary period is essential to determine his fitness and competency. Van Alstyne further opposes a "leveling" policy on the ground that "initial appointments are usually not made with an adequate basis for assessing" a novice teacher's long-term excellence, a condition which is not true in the case of the experienced faculty member. Consequently, there is less reason to suspect the nonreappointment of a probationary teacher than an experienced one. The decision not to rehire the latter "creates a greater suspicion" of being improperly motivated. For example, one may infer that the reasons for nonreappointment of an experienced teacher are "violative of academic freedom...." Finally, as one develops greater expertise in his specialty through time and experience, it becomes more important that his academic freedom not be circumscribed at the moment he is "likely to make an original contribution by what he proposes to do or say."[4]

The case, as presented by Van Alstyne, may not be lightly dismissed on the grounds that he has "made it" and now demands that new faculty members experience, as he did, the tough demands and rigorous tests of the probationary period. The members of the AAUP's Special Committee, comprised

of those who would be the beneficiaries of the equality for all goals of the critics' either/or proposition, specifically stated, "We do not credit this view. We believe that it would be a fundamental mistake for the Association to depart from its longstanding commitment to tenure."[5] Similarly, in endorsing the "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," the committee expressed its concern "that the important distinction between tenure and probation" would be eroded if nontenured teachers erroneously concluded that they have a procedural right to demand that the "decision-making body must justify its decision."[6]

Such statements indicate that there are but few within the academic community who feel that the critics' view should be adopted. Presumably, then, the distinctions as to both status and differences in procedural safeguards afforded tenured teachers as against nontenured will be retained. Since the reasons, justifications and complexities of the issue make unlikely a decision by academicians to remove the apparent anomaly by elevating or reducing all faculty members to the same status, professional groups and their campus affiliates must necessarily concentrate their attention on what may be defined as the basic problem: there is an urgent need "to pursue the question of the due process to which nontenured faculty members are entitled."[7]

That there is indeed such an urgency is demonstrated both in recent litigation, Perry v. Sindermann (1972)[8] and Board of Regents v. Roth (1972)[9], and in the counter-arguments presented in amicus curiae briefs of professional associations, on the one hand, and by the several governing boards of state college and university systems in Illinois, the American Association of State Colleges and Universities, the American Council on Education and the Association of American Colleges, on the other. Their diametrically opposed positions reflected diverse concerns over what will shortly be described as the more traditional and widely-followed policies and practices regarding procedural due process for nontenured teachers. Beyond these stated concerns of the different organizations with respect to the central issue is the evidence, brought to light in the Special Committee's Report, about the breadth of the problem. We may safely say, the Special Committee reported, "that the current individual beneficiaries of Committee A [on Academic Freedom and Tenure, AAUP] mediation, successful resolution, investigation, and report are preponderantly (perhaps as much as three-quarters) nontenured."[10] Given numbers of this magnitude it may be fairly inferred that procedural safeguards surrounding tenured faculty members make a significant difference; there is small likelihood, in view of the complicated procedures that must be followed and the difficulty in making an effective case, that dismissals of tenured faculty will be ordered in many instances. Lacking the same degree of protection, nontenured

teachers may be removed at a much higher rate. And while there are various reasons for the large numbers of nonreappointments--incompetency, financial exigency, a cutback in programs or personality conflicts--there is also the possibility that violations of academic freedom occur with some frequency. The degree and extent to which the AAUP had become involved in nontenured teachers' cases lends support to these inferences.

An articulation of the core problem would require inclusion of these elements: (1) a difference in status produces a degree of difference in procedural safeguards made available to tenured and nontenured faculty; (2) these distinctions are not likely to be removed in favor of placing all teachers on an equal footing; (3) under some circumstances, as in early dismissal, a violation of academic freedom or a failure to give due consideration to evidence that would justify reappointment, a nontenured faculty member is presumably protected by such procedural safeguards as notice and hearing, a presumption that is only valid in the instance of premature removal; (4) since the general practice has been to afford a nontenured teacher no statement of the reasons for nonrehiring and no opportunity for a hearing at which reasons for nonreappointment or allegations about violations of academic freedom may be aired, the college administration and college board are armed with summary and discretionary powers that may be exercised in arbitrary and capricious manner; and (5) the fact that this arbitrary power may be exercised in punitive manner has a "chilling effect" upon the nontenured

faculty member who, in order to save his job and acquire tenure, would prefer to stay on the "safe" side and to avoid expressing himself on controversial matters, even though his right to freedom of expression is guaranteed by the First and Fourteenth Amendments.

These latter conditions define the scope and nature of the problem and suggest the urgency of providing adequate safeguards to the nontenured teacher. They also underscore the dilemma which confronts the academic world. If no distinctions in status and due process existed, all faculty members would be on the same plane, either equally enjoying or equally being denied full academic due process. However, since the distinctions are to be maintained, the degree of procedural due process available to the nontenured teacher is necessarily different from that enjoyed by the tenured faculty. Academicians are thus left with the problem of maximizing academic due process for nontenured teachers without upsetting the status quo in these other respects.

It seems appropriate to identify still other matters in that they provide a context within which to find an answer to the question about seeking additional safeguards for nontenured teachers. First, in seeking greater safeguards, we should not try to achieve through the backdoor the virtual elimination of the distinctions between statuses and safeguards that was denied at the front entrance. This possibility was stated in

the form of question by District Court Judge James Doyle in Board of Regents v. Roth (1970): if the power to decide upon reappointments is sharply curbed,

> will the university become so inhibited that the available spectrums of reasons for non-retention in the two situations will merge, the distinction between tenure and absence of tenure will shrink and disappear, and the university will be unable to rid itself of newcomers whose inadequacies are promptly sensed and grave but not easily defined?[11]

This, Judge Doyle admitted, poses a danger to the institution and to its primary missions of teaching and research, thus a danger that should not be ignored. Nor may we safely overlook the possible danger to the nontenured teacher whose nonretention is based on mistaken, capricious or unjust grounds.

Second, within Judge Doyle's question is an explicit acknowledgement that competing interests are involved. This also suggests that there is a need for employing a balancing test on a case by case basis. This is consonant with the long subscribed-to judicial maxim that rights are only relative. Academic freedom, protected by the First Amendment as a derived right, is no more absolute than any other liberty identified in, or derived from, the Bill of Rights. The same issue was noted by Justice Douglas when he said, "There is sometimes a conflict between a claim for First Amendment protection and the need for orderly administration of the school system." However, since First Amendment freedoms may be at stake, or

fact finding would disclose that the decision not to renew the contract of a nontenured teacher is based upon reasons that are feigned rather than real, summary judgments in such cases "are seldom appropriate."[12]

A third element that is properly included in defining the context within which to find additional procedural safeguards for nontenured teachers stems from recent experiences on many campuses. Militancy among faculty members, a characteristic that is equally descriptive of some young, nontenured faculty members as well as some of their older, tenured colleagues, has produced disruptive tactics that have, in a few cases, brought the educational processes to a standstill. Whether the militancy of these movements derived from opposition to the Indo-China war, institutional complicity in military-related research, the presence of ROTC on campus, faculty-student participation in university governance, racism, sexism or some other issue, the disruptive features had been obvious. "The activist element," Professor Edward Shils wrote, "is at its most extreme in violent, disruptive demonstrations, where the aim is to prevent an institution, usually a defenseless one like a university or a church, from functioning in a normal manner."[13] The need "for an orderly administration of the school system, " a claim reported by Justice Douglas, the sensitivity and virtually defenseless position of the university--conditions which are aggravated by rather than protected through the use of off-campus police and military power--and sincerely expressed concerns about the university's falling victim to external

political pressures by reason of disruptions on campus and in the classroom (of being politicized and thus incapable of performing its teaching and research missions with the largest degree of freedom) are not only matters of concern to academicians and administrators in general but could prove to be grounds for keeping procedural safeguards at the minimal requirement defined by the Supreme Court in Sindermann and Roth.

The context within which an answer to the procedural question is to be found bears importantly on the scope of that answer. The new constitutional doctrine that was defined by the Supreme Court is too narrow in its scope to be accepted by many within the academic community as the final answer. "The rights and responsibilities of public colleges in not reappointing nontenured teachers," John A. Crowl wrote, "appear to be only slightly clearer today than they were" before the Supreme Court decided Sindermann and Roth.[14] Professor Van Alstyne was less charitable in his commentary on Roth, stating that "the majority of the Supreme Court reduced his constitutionally cognizable substantive interests in reappointment to zero."[15] Few would question the claim that the enunciated doctrine was very narrowly defined. However, we must also be aware of another point made by Justice Stewart for the majority:

> Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities.[16]

This may be taken as an invitation by the Court to the academicians. They, rather than judges, should serve as the pathfinders in discovering the outer dimensions of procedural due process for nontenured faculty. All that the Court had done was define a minimal standard that could not be transgressed. On the other hand, should the academic community decide to enlarge upon this minimal standard, it is at liberty to do so.

It is because of the invitation that we should keep in mind the several elements that collectively define the context within which to pursue the question about enlarging upon the procedural requirement set forth in Sindermann and Roth. A principal question is necessarily raised in conjunction with recent campus episodes. Were militancy, disruptive tactics and largely frivolous claims that academic freedom had been violated to persist in great measure in the future, they could adversely affect the thinking, attitudes and views of the teaching faculty no less than of administrators, members of college boards and state legislators, all of whom would be prominently involved in any decision to protect nontenured teachers by making more procedural safeguards available to them.

The foregoing discussion establishes the general framework for this paper. Herein we will examine the questions and issues that were presented to the courts, trace these cases through the several levels of the federal judiciary, discuss and weigh the varied judicial pronouncements

on the central issues and consider the alternatives left open by the Supreme Court as matters more properly the concerns of academicians than of judges.

2. Overcoming Two Obstacles

On June 29, 1972, the Supreme Court defined the new constitutional doctrine in Perry v. Sindermann[17] and Board of Regents v. Roth,[18] a procedural requirement that fell short of the goal desired by some academicians and judges and that went too far in the estimation of others (e.g., governing boards). Under certain circumstances, the Court ruled, notice of the reasons and an opportunity to be heard on allegations of denial of First and Fourteenth Amendment rights must be afforded to nonrehired, nontenured teachers. The arguments of claimants and in amicus curiae briefs and in the varied opinions of the judges on the several federal courts showed how divisive the issue was and how the complexities of the questions presented made impossible any easy answers from the bench. While we must acknowledge the narrowness of the constitutional doctrine that emerged, we may also state that Sindermann and Roth stand, for several reasons, as important landmarks in the history of academic freedom. First, they introduced a new requirement that, while narrowly defined, represented a significant departure from past practices. Secondly, as noted above, the Court extended an invitation to the academic community to move beyond this minimal requirement

should that appear to be desirable. Third, the Court conceived of tenure in a broader sense than had previously been known, a definition, however, that still leaves uncertainty as to the exact nature of the procedural safeguards that are to be made operational. Finally, the several distinctive positions stated in the various opinions may possibly serve as points for further discussion should the academic community accept the Court's invitation.

Not even the narrow constitutional doctrine could have been reached had the federal courts been obedient to either an older constitutional principle or to a generally prevailing practice in the several systems of higher education.

The older constitutional doctrine--public employment is a privilege and not a right--had stood for more than two decades, although its decline was already in progress before 1972. At least Sindermann and Roth wrote the epitaph for that doctrine. In Bailey v. Richardson (1951)[19] an equally divided Supreme Court permitted to stand a lower court ruling that public employment is a privilege, not a right. A privilege is defined as a benefit conferred or withheld at the discretion of the granting agency. Thus defined, the conferral or withdrawal of a privilege is not open to question by the affected party; nor may he claim that the agency's decision can only be consummated upon due notice and a hearing on the reasons why he was either not appointed or not retained. A right,

on the other hand, is by definition not within the power of government to grant and its exercise is protected against abridgement by public authorities. That same "privilege" doctrine, Justice Douglas noted, had been asserted on other occasions when questions arose from the nonreappointment of teachers. The argument had been "that since teaching in a public school is a privilege, the State can grant it or withhold it on conditions. We have, however, rejected that thesis on numerous occasions...."[20]

Other members of the Court were in agreement that the Bailey doctrine had been repudiated. The rejection of this "privilege doctrine" had thus made it possible for the Court to inquire into the constitutional issues in Sindermann and Roth, a course that would not have been open had the justices decided that this was still a viable rule.

The other obstacle, which had to be cleared, was the historic, widely-held notion that nontenured teachers serve only "at the pleasure" of college administrators and boards of regents. This demands fuller elaboration in that it had been a crucial question in both Sindermann and Roth.

Only under the limited circumstances that had been previously described (dismissal before the expiration of the term of the contract) had procedural safeguards been available to nontenured teachers. While some claimed that

nontenured teachers had a right to request a hearing on their allegations that either academic freedom had been violated or inadequate consideration had been given to a record that would warrant reappointment, there is little in the record to suggest that such requests were generally honored. To the contrary, the governing principle--as defined by Bomar v. Keyes (1947),[21] Sindermann v. Perry (1970),[22] Rule II of the Board of Regents of Wisconsin State Colleges[23] and Chief Judge Duffy in his dissenting opinion, Roth v. Board of Regents (1971) [24] underscored the discretionary authority of college administrators and governing boards with respect to the nonretention of nontenured teachers. The traditional viewpoint, as reported by the Court of Appeals in Sindermann, was that

> upon receipt of notice that a new contract will not be offered, the teacher must bear the burden both of initiating proceedings and of proving that a wrong had been done by the collegiate action in not rehiring him. It is incumbent upon such a teacher, not the college, to shoulder these responsibilities because the college may base its decision not to reemploy a teacher without tenure or a contractual expectancy of reemployment upon any reason or upon no reason at all.[25] [Emphasis added].

The first part of the court's statement is questionable in view of what had been the actual case in Sindermann and what appeared to be more generally the case as is illustrated in one of the rules of the Wisconsin Board. Sindermann had not been granted a hearing by the Board, even though he requested one. And Rule II of the Wisconsin Board seemed to be the more widely followed practice:

> During the time a faculty member is on probation, no reason for nonretention need be given. No review or appeal is provided in such case.[26]

Rule II suggests something quite different with respect to the rights of nontenured faculty. Much closer to the actual situation had been that which Chief Judge Duffy reported as the general practice around the United States and that which is implied in the court's statement, "upon any reason or upon no reason at all." Notice and hearing, even at the request of the affected faculty member, were matters that remained solely within the discretionary authority of the governing agencies. The administration and board of regents were not compelled to honor a request by the nonrehired, nontenured faculty member.

Both the usual practice and the underscored conditional last statement by the court demonstrate that an unfettered and discretionary authority had been vested in college administrators and governing boards. By definition, an unfettered discretionary power is not subject to constitutional restraints nor to checks by other public agencies, including the courts. It is, therefore, a power that is suspect, for, in light of Lord Acton's warning, "absolute power corrupts absolutely," this unchecked authority of college administrators and boards might similarly corrupt in that it could be exercised in arbitrary and capricious manner. Because of this likelihood Justice Thurgood Marshall argued in Sindermann and Roth that procedural safeguards must be available in all instances of nontenured teachers' being denied new contracts.

Although other judges refused to go as far as Justice Marshall, they at least felt a sense of urgency in bringing this reappointment power within some kind of constitutional boundaries. Significantly, of the sixteen judges who presided over the Sindermann and Roth cases--two in federal district courts, six in the Courts of Appeals of the Fifth and Seventh Circuits and eight on the Supreme Court[27]--only two, Judge Guinn of the District Court, Western District of Texas, and Chief Judge Duffy, Court of Appeals, Seventh Circuit, saw no justification in upsetting the time-honored belief that nontenured teachers should serve solely "at the pleasure" of governing boards and administrators.

This virtually unanimous agreement on the need to limit the contract renewal power of governing authorities did not mean that there had also been concurrence as to the nature and scope of these restraints. Three distinctive grounds emerged from the several opinions, any one of which might conceivably have won recognition as the new constitutional principle. Some support for two of these points of view can presently be found in academic communities and might even be considered should the Court's invitation to enlarge upon the minimal requirement be taken up by the AAUP, American Federation of Teachers (AFT), national associations of higher education and governing agencies. Because all of these matters are likely to be debated within the academic community in the future, each will be briefly identified at this point and considered more fully in later sections of this paper.

The first is the broadly conceived rule advocated by Justice Marshall and seconded by Brennan and Douglas. Any power, which may be exercised in summary, arbitrary and capricious manner, violates the spirit of the Constitution and should thus be encompassed within constitutional boundaries. Arguments for and against this position will be considered momentarily.

Secondly, there were those judges at each court level who argued that a shadow is cast over a faculty member whose contract had not been renewed. Unless there is an airing of the reasons why he had not been rehired, his chances of finding employment elsewhere in his chosen profession may be jeopardized. What is striking about the arguments on this point were the differences of opinion over the appositeness of a prior Supreme Court decision, Cafeteria and Restaurant Workers v. McElroy (1960)[28] (involving the firing of a cook at a military installation), to the cases at hand.

Finally, there is the ground upon which the new, limited constitutional doctrine was based: procedural safeguards must be available to a nonrehired, nontenured faculty member if the board's decision not to grant a new contract bears a relationship to his having exercised rights protected by the First and Fourteenth Amendments. If there had been even a hint that the board's decision was an act of retaliation--was a way of punishing a nontenured teacher for his public utterances on social issues or educational policies--his constitutional rights had been abridged. Protection for his rights under the First and Fourteenth Amendments, federal judges agreed, may only

be secured by appropriate procedural safeguards.

An understanding of the full implications of these several viewpoints and of the decisions themselves requires an analysis and detailed discussion of each case. We may now turn our attention to Sindermann and Roth, tracing them through the several federal courts and the labyrinth of opinions.

3. The Doubt About Sindermann's Status

Only in one major respect was Sindermann distinguishable from Roth; and yet the Supreme Court's decision virtually eliminated this distinctive feature and made irrelevant its disposition: the difference in status of Sindermann and of Roth had no effect on that issue which was common to both cases. Professor Sindermann had taught for ten years in the state college system of Texas, the last four being at Odessa Junior College, whereas Professor Roth had been a faculty member for but one year at Wisconsin State University--Oshkosh, September 1, 1968 to June 30, 1969, the term of his contract. Obviously Roth was nontenured. But what was Sindermann's status?

Contradictory, published policy statements produced a doubt whether Sindermann had tenure or at least a legally enforceable, contractual "expectancy" of reemployment. The contradiction arose from policy statements in the Faculty Guide of Odessa College and of the Coordinating

Board of the Texas College and University System. On the one hand, a long-standing policy was printed in the Faculty Guide: "Odessa College has no tenure system." In somewhat vague language the Guide then provided,

> The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.[29]

At best the Faculty Guide described some indeterminate position between an explicit commitment to the principle of tenure and a completely unfettered, discretionary authority in the administration. It may have contained the elements of what some courts regarded as a contractual "expectancy" to reemployment. However, its enforceability was in doubt in that absent from the statement was any promise of procedural due process in the event a faculty member's contract was not renewed.

Juxtaposed to the Odessa policy was one promulgated by the Coordinating Board on October 16, 1967. The latter explicitly provided for tenure and procedural due process: a faculty member, who had survived the probationary period, could be dismissed only for "adequate cause" as "demonstrated in a fair hearing, following established procedures of due process."[30] Sindermann argued that he had tenure under the policy statement of the Coordinating Board; therefore, he was entitled to the procedural safeguards prescribed therein.

An answer to the question about this status seemed to bear importantly on the outcome of his case. On the surface at least, only a simple answer seemed to be required by the question, "Did Odessa Junior College come under the authority of the Coordinating Board?" If so, the policy statement of October, 1967, superseded that of the Odessa Faculty Guide. No matter how simply the question may be stated, the fact is that at no level of adjudication had there been any indication as to the legal relationship of Odessa Junior College to the Coordinating Board. And there were, in fact, three different views on his status in the trial, intermediate and highest courts.

Obviously the Board of Regents of Odessa College had not felt bound to comply with the policy statement of the Coordinating Board, for it did not honor Sindermann's request for a hearing nor automatically comply with the procedural due process requirements of the October 1967 policy. Nor did Judge Guinn of the District court accept Sindermann's claim that he was tenured and therefore entitled to procedural due process. In a brief opinion Judge Guinn stated, "Odessa Junior College has no tenure system," a fact that was known to Sindermann from the time he was first employed there. Since Sindermann could not claim tenured status, he had no rights to continued employment nor to notice and hearing. For these reasons Judge Guinn then entered a summary judgement in favor of the defendants, the President of the College and the members of the governing board.[31]

The trial court's record was too scanty for the Court of Appeals to determine whether Sindermann had tenure or a contractural expectancy of reemployment, either of which would have assured him of the notice and hearing standards that were called for by the Coordinating Board and in Ferguson v. Thomas (1970)[32] and Greene v. Howard University (1969).[33] Therefore, the Court of Appeals remanded the case to the district court with instructions to determine Sindermann's status. However, because Perry and the others took an appeal to the Supreme Court, seeking the reinstatement of the summary judgment entered in their favor by the district court, the status issue became one for consideration by the highest rather than lowest bench.

While the presumption that Sindermann had tenure was not accepted, the Supreme Court did develop what must also be regarded as an important and new judicial guideline. No clearly defined, written tenure policy is needed, Justice Stewart announced, for there may be "an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." Such is the case, for example, within a university where not even senior faculty members have an explicit guarantee of tenure, but where such a system may have been created in practice.[34] Thus defined, tenure under these circumstances appears to be as much protected by procedural safeguards as in cases where it is explicitly conferred upon those teachers who successfully complete the probationary period. However, the court's failure to spell out the exact nature of the procedural

requirements leaves doubt as to the meaning, significance and applicability of this "common law" definition. Based as it is on certain understandings and practices, where does it find the needed procedural safeguards? If they must also find their source in such "common law" understandings, their availability and adequacy are at all times in doubt.

Had the Supreme Court found otherwise on the status question, Sindermann's rights to notice and hearing would have been nonetheless assured within the meaning of the new constitutional doctrine that required procedural safeguards under certain circumstances. As long as the decision not to reappoint bore any adverse relationship to a nontenured faculty member's having exercised his rights under the First and Fourteenth Amendments and was actually a punitive measure, procedural safeguards had to be available to him. This principle had been correctly anticipated by the Court of Appeals when it decided Sindermann; and it was a principle that operated irrespective of the status of the faculty member, thus making Sindermann apposite to Roth.

4. The Common Constitutional Issue in Sindermann and Roth

Diversity marked the responses of federal district courts and courts of appeals in these cases. Except for the one distinctive feature about difference in status, the issues in Sindermann and Roth were essentially

the same. Each claimed that the nonrenewal of his contract had been in retaliation for his having publicly expressed opinions contrary to and critical of the policies and practices of the college administrators and governing boards. These similarities and the varying responses from lower federal courts may be noted before we look at the Supreme Court's decision.

As the President of the Texas Junior College Teachers Association, Sindermann had, without permission, absented himself from the classroom on several occasions to testify before committees of the state legislature. On at least one occasion Professor Roth had also absented himself from the classroom in order that he could attend a meeting of the Board of Regents of Wisconsin State Colleges.

Professor Sindermann joined with faculty colleagues in advocating a change in status for Odessa from a junior college to a four year school, a proposal that was specifically opposed by the governing board. Sindermann's conduct was such, the Board of Regents announced in a press release, as to warrant a charge of insubordination. Therefore, his contract had not been renewed. In bringing suit against the President of Odessa College and the members of the board, Sindermann charged that the decision not to rehire him had been a retaliatory action. He was being punished, he contended, because of "his public criticism of the policies of the administration," an action which "thus infringed his right to freedom of speech."[35]

Somewhat similar had been the experience of Professor David Roth, who also contended that the decision not to reappoint him had been a punitive measure. While the reasons for his not being rehired seemed to be largely related to an incident involving the suspension of black students, there may have been other factors as well. For example, the Tenure Committee of the Department of Political Science, the Dean of the School of Letters and Science and the Vice President of Academic Affairs recommended that Roth not be reappointed.[36] Since the reasons for these recommendations are not reported, we can only proceed on the basis of what is described by Justice Douglas. Black students at Wisconsin State University-Oshkosh had engaged in certain disruptive tactics in an effort to win compliance with their demands for such things as a Black Studies Program. The summary suspension of "an entire group of 94 Black students without determining individual guilt" was publicly criticized by Roth. He also "critized the university regime as being authoritarian and autocratic" and he "used his classroom to discuss what was being done about the Black episode...."[37]

On January 30, 1969, the President of the University informed Roth that his contract would not be renewed. This notice conformed to Rule I of the Board of Regents, which set February 1 "as the deadline for written notification" to nontenured teachers with respect to retention or non-reappointment for the next academic year. Rule II, we previously noted, stipulated that it was not necessary to give a reason for nonretention

nor was an appeal or review available. As was true of Professor Sindermann, David Roth viewed the administration's decision as punitive and as an infringement on his right to freedom of expression.

The allegations about punitive measures and retaliatory actions go to the heart of the issue about the power of governing boards to deny renewal of contract. Because of the greater measure of protection for the tenured teacher and procedural requirements that effectively deter governing boards from acting in a manner that would constitute a violation of academic freedom or the right of expression, he may exercise fundamental constitutional freedoms without fear of retaliation. On the other hand, the nontenured faculty member might hesitate to express himself, except on the least controversial points, in the face of such unfettered power. The "chilling effect"--the hesitancy to speak out in view of the likelihood that the power to reappoint might be exercised in punitive manner--effectively produces a second-class citizenship for nontenured teachers. On that point, at least, there was agreement among the vast majority of the judges who heard the Sindermann and Roth cases. And while the allegations in each instance were not proved to the satisfaction of the majority of the Supreme Court, the hint or suspicion that the allegations might be proved true was enough to warrant its remanding both cases for further consideration in light of the minimal procedural requirement that it set.

A major difference of opinion arose at the district court level. Judge Guinn, we noted, adhered strictly to the historic viewpoint that a nontenured teacher is not guaranteed notice and hearing. His opinion and summary judgment thus failed to reach the critical constitutional question about the relationship of a board's power not to rehire and the nontenured teacher's right to have procedural protection for his First and Fourteenth Amendment freedoms. On the other hand, in entering a summary judgment and order for Roth, Judge James Doyle, United States District Court, Western District of Wisconsin, introduced the three grounds that were previously identified as possible bases for a new constitutional doctrine: (1) the question whether an unfettered discretionary power is constitutional; (2) the need to protect by adequate safeguards rights arising under the First and Fourteenth Amendments; and (3) the issue about a shadow being cast upon a nonreappointed faculty member who must seek employment elsewhere in his chosen profession.

There was, in Judge Doyle's opinion, an intermingling of the first two issues: the discretionary authority of the board had to be restricted in order that there be protection for First and Fourteenth Amendment rights. With respect to the last point Judge Doyle distinguished Roth from Cafeteria and Restaurant Employees v. McElroy (1961),[38] wherein the Supreme Court ruled in favor of the government as against the right of a civilian employee at a defense facility. It is one thing, Doyle contended, for the Government of the United States to withdraw security

clearance from a cook at a private concession on a military installation. This governmental action did not operate to deprive her of work in her chosen profession elsewhere. It is fair to say, Judge Doyle continued, that she had been less impeded in obtaining employment elsewhere than would be true "in the case of university professors."[39] He then ordered the Board to commence proceedings for granting a hearing to Roth and to permit the latter to respond to the reasons why it had been decided not to renew his contract. Doyle also instructed the Board, should it choose not to comply with his order for notice and hearing, to offer Roth a contract "for the academic year 1970-1971, on terms and conditions no less favorable to him than those contained in his contract for the academic year 1968-1969."[40] This order was stayed when both parties, Roth, who sought affirmation of the lower court's judgment and order, and the board, which requested a reversal, brought the case before the Court of Appeals, Seventh Circuit.

With one dissent, the Court of Appeals sustained the lower court's finding in favor of Roth. In a relatively brief opinion Judges Fairchild and Kerner agreed with the ruling of the district court, although they made most of that point which deals with jeopardizing the career of a person in the professions. The lower court, Judge Fairchild announced, had "properly considered the substantial adverse effect" the nonrenewal of a contract would probably have. They accepted the urgency of properly

balancing the legitimate interests of the university and the rights of the individual, and they concluded "that offering a professor a glimpse at the reasons (for nonretention) and a minimal opportunity to test them is an appropriate protection."[41] Moreover, Fairchild and Kerner argued, the requirement for procedural due process would serve "as a prophylactic against nonretention decisions improperly motivated by exercise of protected rights."[42]

There is in this conclusion a presumption that the mere threat of being exposed as wrongdoers would force boards to stay within bounds and not transgress the fundamental freedoms of teachers. Presumably, this would then have the effect of becoming so honored in practice that but few occasions would arise in which nontenured teachers, who had not been retained, would demand notice and hearing. Whether the presumption on either point is valid demands our further attention as we consider the likelihood of the academic coummunity's expanding upon the limited procedural requirements.

At a parallel level in the adjudicatory process Professor Sindermann had benefited in two respects. The first was that which we previously discussed: the Court of Appeals had overturned the summary judgment of the district court and instructed Judge Cuinn to determine whether Sindermann was tenured or had an "expectancy to reemployment.' Secondly, the Court of Appeals called attention to its own prior ruling in Pred v.

Board of Public Instruction (1969),[43] a decision that had been handed down after the district court had entered its summary judgment against Sindermann. In view of what had previously been held in Pred, the court stated, the summary judgment in Sindermann v. Perry could not stand. "What is at stake," the court had said in Pred, "is the vindication of constitutional rights," including the right not to be punished by public authorities or to be the victim of a retaliatory act "because a public employee persists in the exercise of First Amendment rights."

Because Pred was consonant with what ultimately emerged as the new constitutional doctrine, it was one of the important landmark cases. However, as was admitted by the Court of Appeals in Sindermann v. Perry, there was disagreement among the intermediate courts over the question of procedurally protecting the First and Fourteenth Amendment rights of nontenured teachers. While its own decisions in Pred and Sindermann were aligned "with the 4th circuit and against the 10th circuit," there was "this as yet unresolved conflict" between courts of the several jurisdictions.[45] The resolution of the conflict thus became the responsibility of the Supreme Court when it decided Sindermann and Roth in June 1972.

5. The Supreme Court's Narrow Response in Sindermann and Roth

Neither Sindermann nor Roth had in fact shown, the Court held, that he had been deprived of either a "liberty" or of a "property interest in

continued employment...." However, the Court was disposed to view favorably the allegations made by each. And while it remanded the cases for further determination of the unanswered questions, it also established the new constitutional doctrine that would now serve as a guideline: public authorities "may not deny a benefit to a person that infringes his constitutionally protected interests--especially, his interest in freedom of speech." To permit otherwise, Justice Stewart contended, would be to penalize and inhibit one who had exercised his rights.

That this new doctrine was narrowly defined is especially evident in the majority's statement that Roth did not have "a constitutional right to a statement for reasons and a hearing on the University's decision not to rehire him for another year." Thus stated, there appeared to be no disagreement between the Court and the Board of Regents over the constitutionality of Rule II. Neither reasons for nonrenewal of a contract nor a hearing could be demanded. Where the Court departed from the Board was on the question of whether nontenured teachers were protected in the exercise of the right to freedom of expression: "When protected interests are implicated," the Court ruled, "the right to some kind of prior hearing is paramount."[46] Whenever a decision not to rehire was tied into the nontenured teacher's rights under the Fourteenth Amendment, procedural requirements had to be met.

Important though the new guideline was, only to that extent had the Court been willing to bring the discretionary powers of college

administrators and boards within the compass of the Constitution. Because this rule had so narrow an applicability, and because the majority refused to accept the trial and appellate courts' contentions about a stigma attaching to a nonrehired teacher, the decision was displeasing to Justices Marshall, Douglas and Brennan. In their estimation the new constitutional doctrine that was enunciated fell short of the restraints which should have been imposed in behalf of nontenured teachers whose contracts had not been renewed.

Justice Marshall's arguments in favor of more severe restrictions on the powers of governing authorities in higher educational systems were, at one and the same time, cogent yet open to question. An important problem, alluded to earlier in this paper, merits restatement at this time: in a free society, summary powers and unchecked discretionary authority are suspect in that there is so strong an implication that power may be exercised arbitrarily and capriciously. Indeed, a somewhat similar problem of much longer standing and arising within a different context had been a matter of concern to the Supreme Court in recent years and led it to impose significant restraints on what historically had been a summary power of judges. In cases of contempt of court, judges had exercised summary and broadly discretionary powers over contumacious persons. This power of the courts, which had its origins in English law[47] and the sanction of precedent, had nonetheless been a troublesome issue for the Supreme Court within the last two decades. Finally, in

such cases as U.S. v. Barnett (1964),[48] Bloom v. Illinois (1968)[49] and Mayberry v. Pennsylvania (1971),[50] the Supreme Court imposed limitations of various kinds on the judges' contempt powers. Since the Supreme Court had felt an urgency in overturning a judicial principle of long standing by severely restricting the power of judges summarily to try, convict and punish contemnors, it would seem equally imperative that the summary powers of other public agencies, including college administrators and governing boards, be similarly restrained.

Protecting public employees from the arbitrary decisions of governmental authorities was an argument vigorously advanced by Justice Marshall in a dissenting opinion that was seconded by Brennan and Douglas. "Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life." Marshall then stated,

> When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious and unreasonable government action.[51]

He acknowledged a contrary argument that to extend procedural safeguards to all public employees might "place an intolerable burden on the machinery of government." The briefest answer, Marshall contended, may be given in response: "...it is not burdensome to give reasons when reasons exist."[52]

Marshall's viewpoint was implicitly rejected by the majority when it declared that Roth had no "constitutional right to a statement of reasons and a hearing on the University's decision" not to renew his contract.[53]

Nor was the majority favorably disposed toward the argument of Judges Doyle, Fairchild and Kerner and Justice Douglas with respect to a shadow of doubt being cast upon the nonrehired, nontenured teacher. "'Badge of infamy,' is too strong a term," Judge Doyle had written, "but it is realistic to conclude that nonretention...creates concrete and practical difficulties for a professor in his subsequent academic career."[54] Affirmation for this contention was forthcoming from Judges Fairchild and Kerner, when Roth reached the Court of Appeals. And the arguments, as presented in the lower two courts, were persuasive to Justice Douglas: "Nonrenewal can be a blemish that turns into a permanent scar," effectively limiting the teacher's chances of finding employment in his profession "at least in his State."[55] To the majority these arguments were without sound foundation in that the nonrehiring of a nontenured teacher did not stigmatize him nor operate as a disability on his finding employment elsewhere. The arguments of Douglas and the others seemed to move in a certain direction: they began by distinguishing between the cook at the military establishment, whose dismissal did not foreclose employment opportunities elsewhere, and a person in the teaching or other profession, whose chances for employment in his chosen field were seriously affected.

The majority, on the other hand, rejected the opposition's efforts to lump together those within the professions, as though they were similarly situated. A professor, the majority argued, cannot be placed in the same situation as a lawyer, who had been denied admission to the bar. A nonreappointed teacher neither is stigmatized nor suffers a disability. He can, therefore, find employment in his chosen profession, whereas the lawyer, who is either not admitted to the bar or is disbarred is clearly deprived of the opportunity of working in his chosen profession. It is imperative, therefore, that lawyers be given every procedural safeguard to insure against unwarranted decisions in the one or other case. The distinction that Douglas and the others made was clearly out of step with the majority's conclusions.

Only under those circumstances in which the decision not to rehire was in retaliation to the nonreappointed teacher's having exercised his rights under the First and Fourteenth Amendments is the nontenured faculty member entitled to procedural due process. "When protected interests [e.g., "liberty" or "property" in a job] are implicated, the right to some kind of a prior hearing is paramount."[56]

6. An Evaluation of the Several Judicial Viewpoints

An evaluation of the several judicial points of view, with an eye toward their implications for developing new procedural guidelines,

requires that certain points be kept in mind: (1) the academic community is not favorably disposed toward obliterating existing distinctions in status and in degrees of procedural due process; (2) there is an oft-repeated claim or acknowledgement that a proper balance must be struck between the teaching and research missions of the institution and the rights of the nonreappointed teacher; (3) weighing the balance slightly in favor of the faculty member is acceptable to academic communities, providing the issues in question bear a relationship to the possibilities that either academic freedom had been denied or inadequate consideration had been given to the merits of his being reappointed (and, as is currently increasingly the case, there are allegations that the decision not to rehire had been impacted by either racism or sexism, two matters that have become campus concerns by reason of federal prodding under positive action guidelines in including more women, blacks and other minority group members on the staff); but (4) as long as we are committed to maintaining the status and procedural due process differences, procedural safeguards for nontenured teachers must be found within a limited framework.

At the outset of this paper a supposition was stated: the vast majority within the academic community are intent upon retaining the status and procedural due process differences. Consequently, it would object to any effort to reach the goal of equal status and treatment through the backdoor that it had effectively blocked at the front

entrance. There are some who would question the validity of this supposition. Nevertheless, the evidence is preponderantly on the side of the stated supposition. To the justifications for retaining the distinctions, as discussed by Professor Van Alstyne,[57] we may add the explicit commitment to these distinctions by the AAUP's Special Committee on Nontenured Faculty[58] and the expressed concern of Committee A on Academic Freedom and Tenure that the backdoor approach might indeed become a reality. There is a risk, the Committee stated, "that the important distinction between tenure and probation will be eroded" were certain procedures to be employed which would erroneously convey to the nonreappointed teacher the notion that the "decision making body must justify its decision."[59]

Because of the widely supported position that distinctions must be retained, the viewpoints of Justices Marshall and Douglas are not acceptable. While starting from different points, Justices Marshall and Douglas reach the same conclusion; and each point of view may be criticized, because it employs the backdoor approach to obliterating the distinctions and because of other inherent weaknesses.

A majority on the Supreme Court claimed that Roth had no constitutional right per se to procedural due process following notice that he would not be reappointed. His claim to procedural safeguards, Justice Stewart ruled, require that he show the necessary connection between the

decision not to rehire him and his having exercised his rights under the Fourteenth Amendment. Marshall construed the majority decision as one of too narrow a definition in that it did not assure fairness of treatment to all public employees, irrespective of status. Drawing upon a wide assortment of decisions in which the Supreme Court protected the right to work for aliens, teachers of foreign languages and federal employees faced with discharge as security risks, and expressing concern that employing agencies might exercise their powers to hire or not to reappoint in arbitrary and capricious manner, Justice Marshall argued that "the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable." Such protection for fairness and equitable treatment are only assured by procedural due process.[60] However, this would also mean that all teachers are to be similarly situated and equally protected by the same procedural safeguards. In view of the commitment of academicians to maintain distinctions rather than eliminate them, the Marshall position must be rejected as a backdoor approach.

Justice Marshall further errs in speaking about "the government." "When something as valuable as the opportunity to work is at stake, the government" may not differently treat or reward citizens. There might be some foundation for his argument were there but one government which had a total monopoly on teaching positions. In fact, however, there are more than 50 systems of higher education (including the District of

Columbia and those in federally-governed territories) and there are many times that number sub-systems. Even within a single state it is neither unique nor exceptional to find that a nonrehired, nontenured faculty member has been employed by one of the other sub-systems. How much more true is the likelihood that the nonreappointed teacher will find employment within the higher educational system of another state? Justice Marshall's position is untenable for the two stated reasons: (1) it would tend to eliminate the distinctions between tenured and probationary teachers, a course that is not desirable to academicians; and (2) since there is no "the government," which has a monopoly on teaching positions, the opportunity to work is not at stake.

An important part of the case Marshall makes is that the appointing and renewal powers be subject to controls lest they be arbitrarily and capriciously exercised. After acknowledging the counter-argument that "an intolerable burden" would be placed on "the machinery of government" if all employees enjoyed the same procedural safeguards, Marshall answered that "it is not burdensome to give reasons when reasons exist."[61] His position closely approximates that of Doyle, Fairchild, Kerner and Douglas, even though they do approach the problem from a different starting point. Their demands that there be "adequate cause" and appropriate hearing thereon stemmed from their concern about nonrenewal becoming "a blemish that turns into a permanent scar...."[62] Carried to its logical conclusion, any decision not to reappoint could produce such a blemish. No matter

what reasons are given, whether they be serious for the faculty member--such as incompetency, unethical conduct in the classroom, personality problems between him and his colleagues that had produced a disturbing atmosphere in the department and a diminishing of its effectiveness--or whether they be quite different in tone as far as the teacher himself is concerned--financial exigency, too many of his specialty in the department, a need to develop greater depth in other sub-fields, or too many in his rank (if an organization table exists)--the consequences of full notice and hearing would still be the same: the blemish would still exist. There may be an airing of the reasons to his satisfaction; but this would not be in an open, courtroom style proceding, nor would the results of the hearing be published as is the trial record in a criminal or civil suit. None of the jurists, who subscribed to the position that a non-reappointed teacher should be discharged only upon "adequate cause," proved that the blemish would be removed merely by having a hearing.

If anything, the reasons should be informally communicated to him, especially if they fall within the serious first category discussed above. Were it to become widely known, as through a published record that is included in his personnel file, that he is incompetent or has personality problems, which appear in the classroom and in associations with his colleagues, then there might indeed be a blemish that would affect his finding employment elsewhere. Under these circumstances, it may be better for the department chairman informally to acquaint him with

his professional or personality shortcomings and to propse that he resign rather than face nonrenewal on the grounds that underlay the decision of his colleagues. Such a course would permit him to make adjustments or corrections, as necessary, and would prevent an undersirable intrusion upon his privacy. Obviously, if he persists in requesting written notice of the reasons upon which the decision not to reappoint were based, he should be accommodated. Any detrimental effect arising therefrom would be as a consequence of his deciding which course of action is preferable.

As is shown in the "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," the problem is much too complex to be resolved by the formulas proposed in the opinions of Judges Doyle, Fairchild and Kerner and in the dissenting opinions of Justices Marshall, Douglas and Stewart. Committee A on Academic Freedom and Tenure had recognized

> that the requirement of giving reasons may lead, however erroneously, to an expectation that the decision making body must justify its decision. A notice of nonreappointment may thus become confused with dismissal for cause, and under these circumstances the decision making body may become reluctant to reach adverse decisions which may culminate in grievance procedures. As a result there is a risk that the important distinction between tenure and probation will be eroded.[63]

This risk would be that much greater should the Marshall or Douglas positions become the bases for new procedural safeguards for nontenured teachers.

The narrowly defined, constitutional doctrine thus remains as the one feature of these cases that does not seek to eliminate the differences in status and in procedural safeguards of tenured and nontenured faculty. While it is true, as John A. Cowl stated, that Sindermann and Roth made "only slightly clearer" the guidelines under which public colleges and universities are to exercise their powers not to reappoint nontenured faculty,[64] these decisions should not be lightly dismissed. They represent something more than what Chief Justice Burger claimed for them. And they do invite the academic community to accept responsibility for defining the procedural rights of nontenured teachers rather than relying upon the courts.

In a concurring opinion Chief Justice Burger felt compelled to isolate the one central ruling, which "may have been obscured in the comprehensive discussion of the issues." His decision to clarify the point was partly dictated by a concern that the Court might have opened the floodgates and federal courts would be swamped by similar cases. Although both a clearly stated rule and the feared consequences may have justified his adding the concurring opinion, there are important questions that must be asked. First, did he construe too narrowly the doctrine that was enunciated by the majority? Second, since a "federal question" is properly invoked in such cases, how can teachers in similar situations be instructed to seek the necessary remedies in state courts?

Chief Justice Burger did acknowledge that portion of the majority opinion that ruled on the issue of a connection between a decision not to rehire and those rights that are protected by the First and Fourteenth Amendments. But he also said that "whether a particular teacher in a particular context has any right to" these protections is "a question of state law."[65] Burger's conclusion on this point is based on a narrow reading of one part of the majority opinion, wherein the Court says approximately what he does in its discussion about "property interests:" however, he failed to note the broader scope of the majority's total discussion about "liberty" and "property interests" as rights protected by the Fourteenth Amendment.[66] The term, "property interests," was not only of general significance as a constitutional question but bore a particular relationship to that incidental principle that emerged from Sindermann: practices and understandings might have created a "common law" tenure system that is not different in any respect from a more explicit policy commitment.

The more critical issue had been that of a decision not to rehire as a punishment for the nontenured teacher's exercising his First and Fourteenth Amendment rights. Since that which is to be protected finds its source in the First and Fourteenth Amendments to the United States Constitution, an infringement of these rights creates a "federal question" that may be answered by either state or federal courts. Other teachers, who find themselves in circumstances similar to Sindermann and

Roth, may, as was frankly stated by the latter, choose to bring their cases into a federal district court as "the only entity to be trusted for a fair hearing."[67] Whether Chief Justice Burger, by way of his concurring opinion, can prevent a "run" on federal courts, necessarily remains speculative. Nevertheless, he did put his finger on a matter that is of even greater concern to universities and college boards: will there be an unleashing of cases in such great numbers that the educational function and administrative processes will be effectively impeded?

An answer to this question necessarily depends upon a number of factors. Chiefly, what is the prevailing climate at a university? Are the policies for renewal clearly stated? Is the school's commitment to academic freedom so flimsy as to create doubts? Are openness and frankness in personnel matters and in intra-campus relationships so evident as to leave no question about integrity within the department, college or university? Is there the prophylactic effect, mentioned by Judges Fairchild and Kerner, that would operate against board members' being improperly motivated in reaching decisions on reappointment? If the prevailing atmosphere is such as to leave no doubt about how fairly, justly and equitably the university acts on personnel matters, frivolous allegations by nonreappointed faculty would find an unsympathetic response both on campus and in the courts. Only when the evidence is as it was in Sindermann and Roth, creating doubts and suspicions, is there any

likelihood of large numbers of cases arising and the courts, state and national, taking jurisdiction.

7. Conclusion

My evaluations of the decisions in Sindermann and Roth lead me to conclusions that differ from those of spokesmen for the AAUP and the AFT. Had the latter been in a position to influence the majority, especially on the Roth case, they would have requested support for the judgment of the Court of Appeals as the more desirable rule. Professor Van Alstyne's critical comment, "the majority of the Supreme Court reduced [Roth's] constitutionally cognizable substantive interests in reappointment to zero," is in the same class as a statement by Oscar Weil, Executive Director of the Illinois affiliate of the AFT. The "Nixon Court," he contended, had effectively reduced the "freedoms teachers previously had." The decisions in Sindermann and Roth tended to destroy academic freedom and prevented "teachers from making the contributions that they should."[68] My disagreement with their favorable commentary on the positions of Judges Fairchild and Kerner (and, incidentally, those of the dissenters on the Supreme Court) derives from the notion that we should not permit a backdoor approach to the eroding of distinctions in status and in the degree of academic due process. For reasons previously stated, accepting the opinions of Fairchild, Kerner and the three dissenters on the Supreme Court would have had exactly this effect. Since it is desirable to

retain the distinctions and still find more effective safeguards for nontenured faculty, we should consider the implications of Sindermann and Roth and the likely direction in which academicians should now move. Sindermann and Roth had provided only a minimal requirement and left to the discretion of academicians consideration of what needs to be done to perfect the situation for nontenured faculty. Since there is a disinclination within the academic community to disturb the present tenure system and to extend procedural due process equally to tenured and nontenured faculty, procedural safeguards for the latter necessarily fall within narrow boundaries.

On the one issue of protecting First and Fourteenth Amendment rights, there can be no distinctions between tenured and nontenured teachers. Such rights, the Court declared, are effectively protected only when surrounded by adequate procedural safeguards. This still leaves open the question about procedural due process in those cases where the issue does not turn upon an infringement of academic freedom or the right to freedom of expression. For example, the Court's doctrine cannot be enlarged to encompass decisions not to rehire where the affected faculty member claims that inadequate consideration had been given to the evidence and record. He may feel that he would have been reappointed had the evidence been fairly weighed and evaluated. However, except that he be able to show a "property interest" in continued employment, as defined by the Supreme Court, there is no way, under the Sindermann and Roth

decisions, that he can request, and expect to have honored, a hearing. Most likely two new issues, which had recently impacted personnel decisions--racism and sexism--could be brought within the compass of these decisions, since a prohibition on discriminatory practices is commanded by the equal protection clause of the Fourteenth Amendment. The constitutional right to equal protection is certainly on the same constitutional footing as the "liberty" and "property interests" discussed by the court.

Because the new constitutional doctrine is narrowly defined at the moment, and in view of the Court's invitation to academicians to be their own pathfinders and not rely upon the judges, there are new justifications for professional societies, college administrators and college boards to see that the next step is taken. A likely starting point for defining anew the principles that should operate and for identifying the procedural safeguards that should be available is the AAUP's "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments."[69] This statement, endorsed by the Annual Meeting in 1971, already provided more definitive and broader guidelines than can be found in Sindermann and Roth. Its universal acceptance would go far in providing the safeguards that are needed without destroying the desired distinctions between the tenured and nontenured.

FOOTNOTES

1. William Van Alstyne, "Tenure: A Summary, Explanation, and 'Defense'," 57 AAUP Bulletin, 328, 331 (Autumn 1971).

2. See the Report of the Special Committee in 58 AAUP Bulletin 156, 157 (Summer, 1972).

3. Van Alstyne, 332.

4. Ibid. at 332-333.

5. "Report of the Special Committee on Nontenured Faculty," 157.

6. 57 AAUP Bulletin, 206, 208 (Summer 1971).

7. Idem.

8. 92 S.Ct. 2694.

9. 92 S.Ct. 2701

10. Report of the Special Committee at 156.

11. 310 F. Supp. 972, 979 (1970).

12. Board of Regents v. Roth, 92 S.Ct. 2701, 2712 (1972).

13. "Intellectuals and the Center of Society," 65 The University of Chicago Magazine 3, 9 (July/August 1972). Professors Seymour Martin Lipset and Everett Carl Ladd, Jr., whose survey of faculty attitudes, disclosed that there had been a backlash to campus disorders of recent years. Professor Ladd stated, "What you have to remember is that while campus disputes were just headlines for millions of people, they were searing experiences for the members of faculties. Whole new lines were drawn in the campus political conflict structure." Portions of this survey were reported by Robert J. Donovan, associate editor of the Los Angeles Times, in a commentary published in the Chicago Sun-Times 34 (October 7, 1972).

14. "Court Rulings Do Little to Clarify Untenured Teachers' Status," The Chronicle of Higher Education 4 (July 31, 1972).

15. William Van Alstyne, "The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann," 58 AAUP Bulletin 267, 268 (Autumn 1972).

16. Board of Regents v. Roth, 92 S.Ct. 2701, 2710 (1972).

17. 92 S.Ct. 2694.

18. 92 S.Ct. 2701.

19. 341 U.S. 918.

20. Board of Regents v. Roth, 92 S.Ct. 2701, 2712 (1972).

21. 162 F. 2d. 136.

22. 430 F. 2d. 939.

23. Board of Regents v. Roth, 92 S.Ct. 2701, 2704 n. 4 (1972).

24. 446 F. 2d. 806, 810

25. Sindermann v. Perry, 430 F. 2d. 939, 944 (1970).

26. Board of Regents v. Roth, 92 S.Ct. 2701, 2704 n. 4 (1972).

27. Justice Powell did not participate.

28. 367 U.S. 886.

29. Quoted by the Supreme Court in Perry v. Sindermann, 92 S.Ct. 2694, 2699 (1972).

30. Idem. at n. 6.

31. The brief opinion and summary judgment were reported in Sindermann v. Perry, 430 F. 2d. 939, 942 (1970).

32. 430 F. 2d. 852.

33. 412 F. 2d. 1128.

34. Perry v. Sindermann, 92 S.Ct. 2694, 2700 (1972).

35. Reported by the Supreme Court, ibid. at 2696.

36. This point is reported only by Chief Judge Duffy in his dissenting opinion, Board of Regents v. Roth, 446 F. 2d. 806, 811 (1971).

37. Board of Regents v. Roth, 92 S.Ct. 2701, 2710 (1972).

38. 367 U.S. 886.

39. Roth v. Board of Regents, 310 F. Supp. 972, 978 (1970).

40. Ibid. at 984.

41. Roth v. Board of Regents, 446 F. 2d. 806, 809 (1971).

42. Ibid. at 810.

43. 415 F. 2d. 851.

44. Ibid. at 856.

45. Sindermann v. Perry, 430 F. 2d. 939, 940 (1970).

46. Perry v. Sindermann, 92 S.Ct. 2694, 2697 (1972).

47. William Blackstone, 4 Commentaries on the Laws of England (Beacon Press Edition) 125 (1962).

48. 376 U.S. 681.

49. 391 U.S. 194.

50. 400 U.S. 455.

51. Board of Regents v. Roth, 92 S. Ct. 2701, 2715 (1972).

52. Ibid., 2716.

53. Ibid., 2705.

54. Roth v. Board of Regents, 310 F. Supp. 972, 979 (1970).

55. Board of Regents v. Roth, 92 S. Ct. 2701, 2713 (1972).

56. Ibid., 2705.

57. "Tenure: A Summary, Explanation, and 'Defense'," 57 AAUP Bulletin 328 (Autumn 1971).

58. See its report, 58 AAUP Bulletin 156 (Summer 1972).

59. "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," endorsed by the Fifty-seventh Annual Meeting of the AAUP, 57 AAUP Bulletin 206, 208 (Summer 1971).

60. Board of Regents v. Roth, 92 S.Ct. 2701, 2715 (1972).

APPENDIX

STATEMENT ON PROCEDURAL STANDARDS IN THE RENEWAL OR NONRENEWAL OF FACULTY APPOINTMENTS*

The Statement which follows was prepared by the Association's Committee A on Academic Freedom and Tenure. It was first published in somewhat different format as a draft report in the March, 1970, AAUP Bulletin, with comments solicited from members, chapters, and conferences. It was adopted by the Council of the American Association of University Professors in April, 1971, and endorsed by the Fifty-seventh Annual Meeting as Association policy.

Introduction

The steady growth in the number of institutions new to college and university traditions, and in the number of probationary faculty members, has underscored the need for adequate procedures in reaching decisions on faculty renewals and for the protection of the probationary faculty member against decisions either in violation of his academic freedom or otherwise improper. Related to this need has been a heightened interest in providing the faculty member with a written statement of reasons for a decision not to offer him reappointment or to grant him tenure. At the Association's Fifty-fifth Annual Meeting, held on April 30 and May 1, 1969, a motion was adopted urging Committee A

> ...to consider adoption of the position that notice of non-reappointment of probationary faculty be given in writing and that it include the reasons for the termination of the appointment. In any allegation that the reasons are false, or unsupported by the facts, or violative of academic freedom or procedures, the proof should rest with the faculty member.

The position which the Annual Meeting urged Committee A to consider had been the primary topic of discussion at the December 14-15, 1968, meeting of the Committee A Subcommittee on Nontenured Faculty, and it was discussed at length again at the subcommittee's meeting on October 11, 1969,

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[1] These procedures do not apply to special appointments, clearly designated in writing at the outset as involving only a brief association with the institution for a fixed period of time.

61. Ibid. at 2716.

62. Ibid., 2713.

63. "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments" at 208.

64. "Court Rulings Do Little to Clarify Untenured Teachers' Status," The Chronicle of Higher Education 4 (July 31, 1972).

65. See his concurring opinion in both Sindermann and Roth, 92 S.Ct. 2701, 2717 (1972).

66. Cf. majority's discussion at ibid., 2706.

67. This was reported by Chief Judge Duffy in Roth v. Board of Regents, 446 F. 2d. 806, 811 (1971).

68. Van Alstyne's remark appears in "The Supreme Court Speaks to the Untenured: A Comment on the Board of Regents v. Roth and Perry v. Sindermann," 58 AAUP Bulletin 267, 268 (Autumn 1972). Mr. Weil's statement was reported in a story about the reasons for the AFT's supporting Senator McGovern for President, The Northern Star 4 (October 6, 1972). Also see commentary of Illinois Federation of Teachers in 26 It's Happening (July 20, 1972) and Richard Hixson, "No Time for Philosophizing", 57 American Teacher 31 (September 1972).

69. 57 AAUP Bulletin 206 (Summer 1971).

at the regular Committee A meetings of April 27-28 and October 29-30, and at a special meeting of Committee A on January 9-10, 1970. The present statement embodies the consensus arrived at during those meetings.

It has long been the Association's position, as stated in The Standards for Notice of Nonreappointment, that "notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing." Although the Association has not attempted to discourage the giving of reasons, either orally or in writing, for a notice of nonreappointment, it has not required that reasons be given.

In considering this question, Committee A endeavored to appraise the advantages and disadvantages of the Association's present policy and the proposed policy in terms of the Association's traditional concern for the welfare of higher education and its various components, including probationary faculty members. The committee also examined the question of giving reasons in the context of the entire probationary period. As a result, this statement goes beyond the question of giving reasons to the more fundamental subject of general fairness in the procedures related to renewal or nonrenewal of term appointments and the granting of tenure.

STATEMENT

The Probationary Period: Standards and Criteria

The 1940 Statement of Principles on Academic Freedom and Tenure prescribes that "during the probationary period a teacher should have the academic freedom that all other members of the faculty have." A number of the nontenured faculty member's rights provide support for his academic freedom. He cannot, for example, be dismissed before the end of a term appointment except for adequate cause which has been demonstrated through academic due process -- a right he shares with tenured members of the faculty. If he asserts that he has been given notice of nonreappointment in violation of academic freedom, he is entitled to an opportunity to establish his claim in accordance with Section 10 of Committee A's Recommended Institutional Regulations. He is entitled to timely notice of nonreappointment in accordance with the schedule prescribed in the statement on The Standards for Notice of Nonreappointment.[2]

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[2]The Standards for Notice are as follows:

(1) Not later than March 1 of the first academic year of service, if the appointment expires at the end of that year: or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

Lacking the reinforcement of tenure, however, the academic freedom of the probationary faculty member has depended primarily upon the understanding and support of his faculty colleagues, the administration, and professional organizations, especially the Association. In the 1966 Statement on Government of Colleges and Universities, the Association and other sponsoring organizations have asserted that "faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal." It is Committee A's view that collegial deliberation of the kind envisioned by the Statement on Government will minimize the risk both of a violation of academic freedom and of a decision which is arbitrary or based upon inadequate consideration.

Frequently the young faculty member has had no training or experience in teaching, and his first major research endeavor may still be uncompleted at the time he starts his career as a college teacher. Under these circumstances, it is particularly important that there be a probationary period -- a maximum of seven years under the 1940 Statement of Principles on Academic Freedom and Tenure -- before tenure is granted. Such a period gives the individual time to prove himself, and his colleagues time to observe and evaluate him on the basis of his performance in the position rather than on the basis only of his education, training, and recommendations.

Good practice requires that the institution (department, college, or university) define its criteria for reappointment and tenure and its procedures for reaching decisions on these matters. The 1940 Statement of Principles prescribes that "the precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated." Committee A also believes that fairness to the faculty member prescribes that he be informed, early in his appointment, of the substantive and procedural standards which will be followed in determining whether or not his appointment will be renewed or tenure will be granted.

We accordingly make the following recommendation:

1. Criteria and Notice of Standards. The faculty member should be advised, early in his appointment, of the substantive and procedural standards generally employed in decisions affecting renewal and tenure. Any special standards adopted by his department or school should also be brought to his attention.

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[2](contd) (2) Not Later than December 15 of the second academic year of service, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

(3) At least twelve months before the expiration of an appointment after two or more years in the institution.

The Probationary Period: Evaluation and Decision

The relationship of the senior and junior faculty should be one of colleagueship, even though the nontenured faculty member knows that in time he will be judged by his senior colleagues. Thus the procedures adopted for evaluation and possible notification of nonrenewal should not endanger this relationship where it exists, and should encourage it where it does not. The nontenured faculty member should have available to him the advice and assistance of his senior colleagues; and the ability of senior colleagues to make a sound decision on renewal or tenure will be enhanced if an opportunity is provided for a regular review of the qualifications of nontenured faculty members. Total separation of the faculty roles in counseling and evaluation may not be possible and may at times be unproductive: for example, an evaluation, whether interim or at the time of final determination of renewal or tenure, can be presented in such a manner as to assist the nontenured faculty member as he strives to improve his performance.

Any recommendation regarding renewal or tenure should be reached by an appropriate faculty group in accordance with procedures approved by the faculty. Because it is important both to the faculty member and the decision-making body that all significant information be considered, he should be notified that a decision is to be made regarding renewal of his appointment or the granting of tenure and should be afforded an opportunity to submit material in writing which he believes to be relevant to that decision.

We accordingly make the following recommendations:

2. (a) Periodic Review. There should be provision for periodic review of the faculty member's situation during the probationary service.

2. (b) Opportunity to Submit Material. The faculty member should be advised of the time when decisions affecting renewal and tenure are ordinarily made, and he should be given the opportunity to submit material which he believes will be helpful to an adequate consideration of his circumstances.

Observance of the practices and procedures outlined above should minimize the likelihood of reasonable complaint if the nontenured faculty member is given notice of nonreappointment. He will have been informed of the criteria and procedures for renewal and tenure; he will have been counseled by faculty colleagues; he will have been given an opportunity to have all material relevant to his evaluation considered; and he will have received a timely decision representing the view of faculty colleagues.

Notice of Reasons

With respect to giving reasons for a notice of nonreappointment, practice varies widely from institution to institution, and sometimes within institutions. At some, in accordance with the institution's regulations, the faculty member is provided with a written statement of the reasons. At others, generally at the discretion of the department chairman, he is notified of the reasons, either orally or in writing, if he requests such notification. At still others, no statement of reasons is provided even upon request, although information is frequently provided informally by faculty colleagues.

Resolving the question of whether a faculty member should be given a statement of reasons, at least if he requests it, requires an examination of the needs both of the institution and of the individual faculty member.

A major responsibility of the institution is to recruit and retain the best qualified faculty within its means. In a matter of such fundamental importance, the institution, through the appropriate faculty agencies, must be accorded the widest latitude consistent with academic freedom and the standards of fairness. Committee A recognizes that the requirement of giving reasons may lead, however erroneously, to an expectation that the decision-making body must justify its decision. A notice of nonreappointment may thus become confused with dismissal for cause, and under these circumstances the decision-making body may become reluctant to reach adverse decisions which may culminate in grievance procedures. As a result there is a risk that the important distinction between tenure and probation will be eroded.

To be weighed against these important institutional concerns are the interests of the individual faculty member. He may be honestly unaware of the reasons for a negative decision, and the decision may be based on a judgment of shortcomings which he could easily remedy if informed of them. A decision not to renew an appointment may be based on erroneous information which the faculty member could readily correct if he were informed of the basis for the decision. Again, the decision may be based on considerations of institutional policy or program development which have nothing to do with the faculty member's competence in his field, and if not informed of the reasons he may mistakenly assume that a judgment of inadequate performance on his part has been made. In the face of a persistent refusal to supply the reasons, a faculty member may be more inclined to attribute improper motivations to the decision-making body or to conclude that its evaluation has been based upon inadequate consideration. If he wishes to request a reconsideration of the decision, or a review by another body, his ignorance of the reasons for the decision will create difficulties both in reaching a decision whether to initiate such a request and in presenting his case for reconsideration or review.

After careful evaluation of these competing concerns, Committee A has concluded that the reasons in support of the faculty member's being informed outweigh the countervailing risks. Committee A emphasizes that in reaching this conclusion it does not consider it appropriate to require that every notice of nonreappointment be accompanied by a written statement of the reasons for nonreappointment. It may not always be to the advantage of the faculty member to be informed of the reasons, particularly in writing. If he is informed of them, he can be placed under an obligation to divulge them to the appointing body of another institution if it inquires why he is leaving his present position. Similarly, a written record is likely to become the basis for continuing responses by his former institution to prospective appointing bodies and may thus jeopardize his chances for obtaining positions over an extended period.

At many institutions, moreover, the procedures of evaluation and decision may make it difficult, if not impossible, to compile a statement of reasons which precisely reflects the basis of the decision. When a number of faculty members participate in the decision, they may oppose a reappointment for a variety of reasons, few or none of which may represent a majority view. To include every reason, no matter how few have held it, in a written statement to the faculty member may misrepresent the general view and damage unnecessarily both the faculty member's morale and his professional future.

In many situations, of course, a decision not to reappoint will not reflect adversely upon the faculty member. An institution may, for example, find it necessary for financial or other reasons to restrict its offerings in a given department. A number of institutions appoint more faculty members than they expect to give tenure; at such institutions a limit has been placed on the number of faculty at each rank, and the acquisition of tenure depends not only upon satisfactory performance but also upon an opening in the ranks above instructor or assistant professor. Nonrenewal in these cases is not likely to be psychologically damaging or to suggest a serious adverse judgment.

In these situations, providing a statement of reasons, either written or oral, should pose no difficulty, and such a statement may in fact assist the faculty member in his search for a new position. In other situations, in spite of his awareness of the considerations cited above, the faculty member may ask to be advised of the reasons which contributed to his nonreappointment, and Committee A believes that he should be given such advice. It believes also that he should have the opportunity to request a reconsideration by the decision-making body.

We accordingly make the following recommendation:

3. Notice of Reasons. In the event of a decision not to renew his appointment, the faculty member should be informed of the decision in writing, and

if he so requests, he should be advised of the reasons which contributed to that decision. He should also have the opportunity to request a reconsideration by the decision-making body.

Written Reasons

Having been given orally the reasons which contributed to his nonreappointment, the faculty member, to avoid misunderstanding, may request that they be confirmed in writing. He may wish to petition the appropriate faculty committee, in accordance with Section 10 of Committee A's Recommended Institutional Regulations, to consider an allegation that the reasons he was given violate his academic freedom, or that the primary reasons for the notice of nonreappointment were not stated and constitute a violation of his academic freedom. He may wish to petition a committee, in accordance with Section 15 of the Recommended Institutional Regulations, to consider a complaint that the decision resulted from inadequate consideration and was therefore unfair to him. He may feel that a written statement of reasons may be useful to him in pursuing his professional career.

If the department chairman or other appropriate institutional officer to whom the request is made feels that confirming the oral statement in writing may be damaging to the faculty member on grounds such as those cited earlier in this statement, Committee A believes that it would be desirable for him to explain the possible adverse consequences of confirming the oral statement in writing. If in spite of this explanation the faculty member continues to request a written statement, Committee A believes that his request should be honored.

We accordingly make the following recommendation:

4. Written Reasons. If the faculty member expresses a desire to petition the grievance committee (such as is described in Sections 10 and 15 of Committee A's Recommended Institutional Regulations), or any other appropriate committee, to use its good offices of inquiry, recommendation, and report, or if he makes the request for any other reason satisfactory to himself alone, he should have the reasons given in explanation of the non-renewal confirmed in writing.

Review Procedures: Allegations of Academic Freedom Violations

The best safeguard against a proliferation of grievance petitions on a given campus is the observance of sound principles and procedures of academic freedom and tenure and of institutional government. Committee A

believes that observance of the procedures recommended in this statement -- procedures which would provide guidance to nontenured faculty members, help assure them of a fair professional evaluation, and enlighten them concerning the reasons contributing to key decisions of their colleagues -- would constitute a further step in the achievement of harmonious faculty relationships and the development of well-qualified faculties.

Even with the best practices and procedures, however, faculty members will at times feel that they have been improperly or unjustly treated and may wish another faculty group to review a decision of the faculty body immediately involved. Committee A believes that fairness both to the individual and the institution requires that the institution provide for such a review when it is requested. A possible violation of academic freedom is of vital concern to the institution as a whole, and where a violation is alleged it is of cardinal importance to the faculty and the administration to determine whether substantial grounds for the allegation exist. The institution should also be concerned to see that decisions respecting reappointment are based upon adequate consideration, and provision should thus be made for a review of allegations by affected faculty members that the consideration has been inadequate.

Because of the broader significance of a violation of academic freedom, Committee A believes that the procedures to be followed in these two kinds of complaints should be kept separate. Section 10 of the Recommended Institutional Regulations, mentioned earlier in this statement, provides a specific procedure for the review of complaints that academic freedom has been violated.[3]

> If a faculty member on probationary or other nontenured appointment alleges that considerations violative of academic freedom significantly contributed to a decision not to reappoint him, his allegation will be given preliminary consideration by the /insert name of committee_/, which will seek to settle the matter by informal methods. His allegation shall be accompanied by a statement that he agrees to the presentation, for the consideration of the faculty committees, of such reasons and evidence as the institution may allege in support of its decision. If the difficulty is unresolved at this stage, and if the committee so recommends, the matter will be heard in the manner set forth in Regulations 5 and 6, except that the faculty member making the complaint is responsible for stating the grounds upon which he bases his allegations, and the burden of proof shall rest upon him. If he succeeds in establishing a prima facie case, it is incumbent upon those who made the decision not to reappoint him to come forward with evidence in support of their decision.

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[3]Because the Recommended Institutional Regulations remain under review by Committee A, faculties processing complaints under Sections 10 and 15 may wish to secure the further advice of the Association's Washington Office.

We accordingly make the following recommendation:

5. Petition for Review Alleging an Academic Freedom Violation (Section 10, Recommended Institutional Regulations). Insofar as the petition for review alleges a violation of academic freedom, the functions of the committee which reviews the faculty member's petition should be the following:

(a) To determine whether or not the notice of nonreappointment constitutes on its face a violation of academic freedom.

(b) To seek to settle the matter by informal methods.

(c) If the matter remains unresolved, to decide whether or not the evidence submitted in support of the petition warrants a recommendation that a formal proceeding be conducted in accordance with Sections 5 and 6 of the Recommended Institutional Regulations, with the burden of proof resting upon the complaining faculty member.

Review Procedures: Allegations of Inadequate Consideration

Complaints of inadequate consideration are likely to relate to matters of professional judgment, where the department or departmental agency should have primary authority. For this reason, Committee A believes that the basic functions of the review committee should be to determine whether adequate consideration was given to the appropriate faculty body's decision and, if it determines otherwise, to request reconsideration by that body.

It is easier to state what the standard "adequate consideration" does not mean than to specify in detail what it does. It does not mean that the review committee should substitute its own judgment for that of members of the department on the merits of whether the candidate should be reappointed or given tenure. The conscientious judgment of the candidate's departmental colleagues must prevail if the invaluable tradition of departmental autonomy in professional judgments is to prevail. The term "adequate consideration" refers essentially to procedural rather than substantive issues: Was the decision conscientiously arrived at? Was all available evidence bearing on the relevant performance of the candidate sought out and considered? Was there adequate deliberation by the department over the import of the evidence in the light of the relevant standards? Were irrelevant and improper standards excluded from consideration? Was the decision a bona fide exercise of professional academic judgment? These are the kinds of questions suggested by the standard "adequate consideration."

If in applying this standard the review committee concludes that adequate consideration was not given, its appropriate response should be to recommend to the department that it assess the merits once again, this time remedying the inadequacies of its prior consideration.

An acceptable review procedure, representing one procedural system within which such judgments may be made, is outlined in Section 15 of the Recommended Institutional Regulations, as follows:

> If a faculty member feels that he has cause for grievance in any matter other than dismissal proceedings -- such matters as salaries, assignment of teaching duties, assignment of space or other facilities, and propriety of conduct -- he may petition the elected faculty grievance committee [here name the committee] for redress. The petition shall set forth in detail the nature of the grievance and shall state against whom the grievance is directed. It shall contain any factual or other data which the petitioner deems pertinent to his case. The committee will have the right to decide whether or not the facts merit a detailed investigation. Submission of a petition will not automatically entail investigation or detailed consideration thereof. The committee may seek to bring about a settlement of the issue satisfactory to the parties. If in the opinion of the committee such a settlement is not possible or is not appropriate, the committee will report its findings and recommendations to the petitioner and to the appropriate administrative officer and faculty body [here identify], and the petitioner will, at his request, be provided an opportunity to present his case to them.
>
> The grievance committee will consist of three [or some other number] members of the faculty who have tenure and who are elected at large. No department chairman or administrative officer shall serve on the committee.

We accordingly make the following recommendation:

6. Petition for Review Alleging Inadequate Consideration (Section 15, Recommended Institutional Regulations). Insofar as the petition for review alleges inadequate consideration, the functions of the committee which reviews the faculty member's petition should be the following:

> (a) To determine whether the decision of the appropriate faculty body was the result of adequate consideration in terms of the relevant standards of the institution, with the understanding that the review committee should not substitute its judgment on the merits for that of the faculty body.
>
> (b) To request reconsideration by the faculty body when the committee believes that adequate consideration was not given

to the faculty member's qualifications. (In such instances, the committee should indicate the respects in which it believes the consideration may have been inadequate.)

(c) To provide copies of its report and recommendation to the faculty member, the faculty body, and the president or other appropriate administrative officer.